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No. 03-677

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In The
Supreme Court of the United States

GLENN A. HAWKINS, NEDRA J. HAWKINS, MARTIN F. RADMER, GERALD W. BREDENBERG, JOANNE JUST, CHRISTOPHER E. SCHROEDER, AND CHARLES SATTLER,

Petitioners,

v.

AID ASSOCIATION FOR LUTHERANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

This reply brief is limited to the discussion of erroneous or inaccurate characterizations of case authority cited by Respondent.

REASONS FOR GRANTING THE WRIT

I. An order remanding a case for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1447(c) is *res judicata* on the issue of subject matter jurisdiction.

A. Discussion of *Standefer* and *Johnson*. Res. 7-10.

Respondent's arguments based on *Standefer v. United States*, 447 U.S. 10 (1980) ignore the context of *Standefer*, a criminal case in which the Court addressed an assertion of non-mutual collateral estoppel. In that case, the Court declined to give the acquittal of a principal preclusive effect in the subsequent aiding and abetting trial of the co-defendant agent. The Court noted the difference between a criminal trial and a civil trial, including numerous aspects of criminal law that often leave the Government without a full and fair opportunity to litigate.

The Court's focus in *Standefer* was on the unavailability of appellate review of *jury verdicts*. The Court observed that in the criminal context, juries may acquit out of compassion or compromise or because of "their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." [citations omitted]. *Id.* at 22. The civil equivalent is a jury verdict induced by passion or prejudice. *Id.* at 23. The Court's

illustrative reference to the availability of appellate review of civil jury awards does not encompass non-jury judicial determinations such as the remand order in this case.

Standefer did not overrule *Johnson Steel Street-Rail Co. v. Wharton*, 152 U.S. 252 (1894) and did not make *Johnson* a mere "exception" to some new rule. To the contrary, *Standefer* explicitly circumscribed its reference to Restatement § 68.01 by citing *Johnson* and noting that its reference to § 68.01 should not be read "to suggest that the availability of appellate review is always an essential predicate of estoppel. *See Johnson Co. v. Wharton* [citation omitted]." *Standefer*, 447 U.S. at 23, n.18.

Standefer makes clear that *Johnson* remains good law. Respondent's characterization of *Johnson* as an "exception" to Restatement § 28(1) begs the question of whether *Johnson* applies to unappealable remand orders. The first question posed by the Petition for a Writ of Certiorari remains viable and important: is the availability of appellate review of a judicial remand order under 28 U.S.C. § 1447(c) an essential predicate of preclusion?

B. Discussion of cases representing the Circuit Split. Res. 9-10.

Contrary to the representations of Respondent, the Fifth Circuit has not "cut back" on *Napper v. Anderson, Henley, Shields, Bradford & Prichard*, 500 F.2d 634 (5th Cir. 1974). Res. 9. *Beiser v. Weyler*, 284 F.3d 665 (5th Cir. 2002) involved the question of whether a claim "related to" an arbitration agreement so as to confer removal jurisdiction under § 205 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Beiser* does not address the *res judicata* effect of the jurisdictional ruling

itself, but rather addresses the *res judicata* considerations relevant to any subsidiary findings relating to the *merits* of the case that might have been implied in the jurisdictional ruling. *Beiser* does not mention *Napper.*

Winters v. Diamond Shamrock Chemical Co., 149 F.3d 387 (5th Cir. 1998) likewise did not "cut back" on *Napper*. *Winters* was a case of non-mutual, offensive collateral estoppel. This distinction was significant to the Fifth Circuit which distinguished *Johnson, supra,* as a "true" *res judicata* case, and *Napper* as a case involving mutual offensive estoppel. *Id.* at 396. The case before this Court on the Petition for a Writ of Certiorari is a "true" *res judicata* case involving mutual estoppel and falls within the *res judicata* principles of *Johnson* and *Napper*.

Respondent's characterizations of decisions from the Sixth and Second Circuits are also inaccurate and misleading. *Concerned Citizens of Cohocton Valley, Inc. v. New York State Dep't of Envt'l Conservation*, 127 F.3d 201 (2d Cir. 1997) unequivocally stated that the district court's jurisdictional determination was *res judicata*. ("That ruling [dismissing the case for lack of subject matter jurisdiction] is preclusive only on the narrow issue of whether the state law claims alleged by CCCV can be maintained in federal court.") *Id.* at 206. The Second Circuit recognized a clear distinction between the jurisdictional determination, which was entitled to preclusive effect, and a subsidiary ruling relating to the merits. The general reference in the opinion to the Restatement (Second) of Judgments related to the latter, not the former.

Concerned Citizens of Cohocton Valley is the most recent Second Circuit case cited by Respondent. That case

makes clear that the Second Circuit considers determinations of subject matter jurisdiction to be *res judicata*. *Concerned Citizens of Cohocton Valley* included a discussion of *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38 (2d Cir. 1986), the oldest Second Circuit case cited by Respondent, so there is no doubt that the court had *Gelb* in mind when the opinion was written. The opinions in both *Gelb* and *Concerned Citizens of Cohocton Valley* were written by Judge Jon Newman. Therefore, when Judge Newman wrote in *Concerned Citizens of Cohocton Valley* that the ruling on the subject matter jurisdiction issue was preclusive, it is logical to assume that he saw the issue of the preclusive effect of a determination of subject matter jurisdiction to be distinguishable from the situation in *Gelb*. The other Second Circuit cases cited by Respondent, *In re DES Litigation*, 7 F.3d 20 (2d Cir. 1993), *Pinkney v. Keane*, 920 F.2d 1090 (2d Cir. 1990), and *Johnson v. Watkins*, 101 F.3d 792 (2d Cir. 1996) pre-date *Concerned Citizens of Cohocton Valley* and do not address the precise issue of the preclusive effect of a determination of subject matter jurisdiction.

Respondent's discussion of Sixth Circuit cases suffers from similar mischaracterizations. Res. 10. *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341 (6th Cir. 1993) is not an endorsement of the rule set forth in § 28 of the Restatement. *Baldridge* presented the unrelated question of appellate jurisdiction over a § 1447(c) remand order. The Sixth Circuit concluded that it did not have jurisdiction and dismissed the appeal. Respondent's citation to page 1350 of the opinion is presumably directed to the final sentence of the Court's opinion which states that the court's jurisdictional findings do not preclude defendants from raising the substantive defense of preemption in the

remanded state court proceeding. Respondent fails to grasp the distinction in this and other preemption cases it cites that explains why the jurisdictional finding incident to remand did not have preclusive effect in those cases. *Baldridge, Id., Nutter v. Monongahela Power Co.*, 4 F.3d 319 (4th Cir. 1993), *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406 (5th Cir. 1991), and *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539 (11th Cir. 1986) are all distinguishable because the lack of preclusive effect turned on the distinction between the jurisdictional determination that there was no complete preemption (and therefore no federal jurisdiction) and the separate, independent substantive defense of preemption which could still be asserted and pursued in the remanded cases.

Two other Sixth Circuit cases cited by Respondent were unpublished opinions. The Local Rules of the Sixth Circuit limit the citation of unpublished opinions to specific situations, none of which is present in this case. Therefore, *Century Bus. Servs., Inc. v. Bryant*, 2003 U.S. App. LEXIS 13877 (6th Cir. 2003) and *Thacker v. Director, OWCP*, 891 F.2d 292 (6th Cir. 1989) should not have been cited to this Court and should be disregarded.

II. Challenges to limitations on remedies and procedures as elements of an unconscionability defense must be addressed by the court and not an arbitrator.

Respondent cites a number of cases in support of its assertion that "challenges to contractual limitations on the availability of certain remedies and procedures in arbitration must be presented to the arbitrators in the first instance." Res. 15. Most of Respondent's cases hold that "an agreement containing a provision that impermissibly

precludes or limits statutorily authorized remedies is still a valid agreement pursuant to which the case is to be sent to arbitration, where the arbitrator decides the remedies issues along with all the others." *See Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1031 (11th Cir. 2003).

In *Anders*, 346 F.3d at 1031, n.7, as well as *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 824, n.3 (8th Cir. 2003), the courts found that the inclusion of a severability clause made it appropriate for the arbitrator to first consider the challenges to limitations on statutory rights. The Eleventh Circuit used the existence of the severability clause to distinguish *Anders* from *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998) in which it held an arbitration clause invalid as its remedial restrictions denied the employee the possibility of meaningful relief. There is no such severability clause in the arbitration provision retroactively and unilaterally imposed upon Petitioners in this case. Pet. App. 126-128. In addition, these cases expressly held that the arbitration clause at issue was valid and applicable before holding that the issue of the waiver of statutory and other remedies was for the arbitrator to decide. These cases do not address whether a limitation on remedies is an additional element in determining if the arbitration clause is unconscionable and therefore invalid.

While the Eighth Circuit held in *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002), that "issues of remedy go to the merits of the dispute and are for the arbitrator to resolve in the first instance," the Eighth Circuit expressly noted that the *Arkcom* plaintiffs had not argued that the clause was unconscionable. *Id.* at 539, n.2. Petitioners here have argued that the limitation on remedies is an element of substantive unconscionability

that a court must address in determining whether there is an enforceable arbitration agreement. Pet. 25. Indeed, none of the cases cited by Respondent address the question of unconscionability as a defense to arbitrability.

III. AAL must comply with its conditions precedent before seeking to compel arbitration.

Respondent states that the cases cited by Petitioner, *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) and *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287 (11th Cir. 2002), "are readily distinguishable, because in both cases a party sought to compel arbitration before the opposing party filed a lawsuit in defiance of an arbitration agreement." Res. 18-19. That is not correct. In *HIM*, the plaintiff filed a breach of contract claim in the District Court and it was only after the defendant answered the complaint that the plaintiff moved to compel arbitration. 317 F.3d at 42. In *Kemiron*, the plaintiff brought suit for breach of contract and the defendant responded with a motion to stay pending arbitration. 290 F.3d at 1289. Respondent has misstated the facts of these cases and its contention that these cases are distinguishable is wrong. Respondent must comply with the two conditions precedent before moving to compel arbitration, something it clearly has not done. Pet. 19.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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